Supreme Court, U.S.
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In the

Supreme Court of the United States

MICHAEL FLANAGAN, NORBERT KUKSTA, MELVIN SCHABILION, SAUL WEINSTEIN, and FRANCIS E. WHITE,

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES AND DRUG ENFORCEMENT ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

1. Whether the application of Rule 56 of the Federal Rules of Procedure to the issue of pretext by the trial court and by the Seventh Circuit Court of Appeals denied the Petitioners right to a jury trial under the Seventh Amendment.

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PETITION FOR WRIT OF CERTIORARI

Now come Michael Flanagan, Norbert Kuksta, Melvin Schabilion, Saul Weinstein and Francis E. White, Petitioners, and respectfully request that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on January 21, 2003 in *Michael Flanagan et al. v. John Ashcroft, Attorney General of the United States, and Drug Enforcement Administration.*

OPINION BELOW

The affirming Order and Opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported and is reproduced at App. 1, infra.

JURISDICTION

The Judgment of the Seventh Circuit was entered on January 21, 2003. Justice Stevens granted an extension of time in which to file a Petition for a Writ of Certiorari to and including June 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides, among other things:

> the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the Rules of the common law.

Title 42, United States Code, Section 2000(e)(3) (Title VII of the Civil Rights Act of 1964, as amended), in pertinent part, states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * *, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Rule 56 of the Federal Rules of Civil Procedure, in pertinent part, states:

> (b) For Defending Party. A party against whom a claim, counterclaim or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and proceedings thereon. The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This case involves a suit under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e), *et. seq.*) brought by five employees of the United States Drug Enforcement Administration (DEA). The plaintiffs alleged that they had been discriminated against on the basis of gender and race (Count One); and suffered severe re-

taliation for engaging in protected activity as defined in the Statute (Count Two).

The defendants filed motions to dismiss on November 10 and 26, 1997. On June 3, 1998, the trial court dismissed Count One of the Complaint. On January 21, 2003, the Court of Appeals for the Seventh Circuit affirmed that dismissal.

On March 16, 2000, the defendants moved for summary judgment on the retaliation charge (Count Two). On April 28, 2000, the plaintiffs filed pleadings and exhibits in opposition to the summary judgment motion. On May 23, 2000, the defendants filed further pleadings in support of the motion.

The trial court had little difficulty in finding that the plaintiffs produced sufficient evidence to establish a prima facie case of retaliation (Mem. Op. pp. 9-11; App. 27-31). The onus of production then shifted to the defendants to produce evidence of a legitimate, non-discriminatory reason for the adverse action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The employer can satisfy that feeble burden by announcing a non-discriminatory reason and producing but a tincture of supporting evidence and the presumption in favor of the plaintiffs "drops out." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). At that point, the plaintiffs must produce facts sufficient to infer that the proffered reasons are not the true reasons, but were merely pretextual. *Burdine*, *supra*, at 450 U.S. 253. In that case, summary judgment is no longer appropriate, and the plaintiffs must be afforded the full and fair opportunity to demonstrate to a jury that the proffered reason was not the true reason for the employment decision, but was in fact a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

On June 14, 2000, the trial court ignored the evidence that established the *prima facie* case. Relying exclusively on self-serving declarations by high level officials of DEA and the Justice Department, the court granted the defense summary judgment and dismissed the case (App. 5, 6).

The Court of Appeals for the Seventh Circuit minimally discussed the evidence in the record before it, and, on January 21, 2003, affirmed the dismissal of plaintiffs' case (App. 1). As a consequence of the district court's opinion and the decision of the court of appeals, the plaintiffs were denied an opportunity to have the critical issue of pretext now decided by a jury. The question, then, is whether a federal court may, consistent with the Seventh Amendment, grant summary judgment when the moving party produces only self-serving declarations by interested officials.

The Seventh Amendment and Rule 56 of the Federal Rules of Civil Procedure

Since its adoption, the right secured by the Seventh Amendment to the Constitution of the United States has never been intended to insure that all civil cases must be resolved by a jury. It is, however, a right that required disputed material facts to be decided by a jury without judicial intervention except in the narrow circumstances permitted by the common law. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.")

When the Federal Rules of Civil Procedure were adopted, Congress essentially codified the procedure for summary judgment "for promptly disposing of actions in which

there is no genuine issue as to any material fact." *See* Fed.R.Civ.P. 56, Advisory Committee Note (1937), reprinted in 12A Charles Alan Wright, et al., *Federal Practice and Procedure*.

A federal trial court is thus empowered to grant judgment without a jury trial under Rule 56 when it determines that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. Rule 56(c). The standards applicable to Rule 56 motions "mirror the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). That is, judgment without trial is only warranted when there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943).

Constitutional integrity has been preserved by the federal judiciary through strict compliance with the standard. In the past few years, though, the courts have increasingly loosened the strict requirements for granting dispositive motions, perhaps in the interest of judicial economy and docket control. That despite this Court's admonition that trial courts should "act . . . with caution in granting summary judgment [and] . . . the trial court may . . . deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Thus, Rule 56 is intended not as a method of trying issues of fact, or weighing the evidence, but only to determine whether such issues actually exist. Nor can it be used to deprive a litigant of a full trial of genuine material facts as guaranteed by the seventh amendment. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468 (1962); *Sartor v. Arkansas National Gas Corp.*, 321 U.S.

620, 627 (1944). Thus a dispositive motion should be cautiously invoked so that all genuine factual issues will be decided at a trial. *Associated Press v. United States*, 326 U.S. 1, 6 (1945).

The petitioner does not suggest that the proper application of Rule 56 runs afoul of constitutional guarantees, and this Court has so decided. *Fidelity and Deposit Co. of Maryland v. U.S. to Use of Smoot*, 187 U.S. 315, 320 (1902).

A motion under Rule 56 and a motion for a directed verdict under Rule 50 differ in a number of respects. Nonetheless, the standard for granting judgment as a matter of law is the same.

> [T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). *See also Agosto v. Immigration and Naturalization Serv.*, 436 U.S. 748, 770, n.8 (1978). The insidious, yet contant erosion of the right of litigants to have their cases tried by a jury has prompted "grave concerns . . . concerning the constitutional right of civil litigants to a jury trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 267 (1986) (Brennan, Justice, Dissenting).

The Seventh Circuit decision in this case increases dramatically an existing disorder in the courts of appeals about strict compliance with Rule 56, particularly in employment discrimination cases. At both the district and appellate levels, confusing and often contradictory decisions are proliferating rapidly. This nothwithstanding recent efforts by this Court to set out principles for guidance. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

I.

REASONS FOR GRANTING THE WRIT

The Petition should be granted because the opinion below conflicts with this Court's prior rulings concerning the evidence required to establish pretext after the plaintiff has made out a *prima facie* case.

As early as 1973, this Court announced a burden-shifting method to be used in employment discrimination cases where the plaintiff is unable to produce direct evidence of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that method, once the plaintiff has made out a *prima facie* case, a rebuttable presumption of discrimination attaches. 411 U.S. at 802. At that point the burden of production shifts to the defendant to come forth with minimal evidence of a legitimate nondiscriminatory reason for the adverse action. 411 U.S. at 802-03. Once that happens, the rebuttable presumption "drops out of the picture." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The defendant having produced such evidence, the burden shifts to the plaintiff to show that the stated reason was merely a pretext for discrimination. 411 U.S. at 804.

From the beginning the several circuits have been struggling with the issue of pretext and the level of evidence that the plaintiff must produce on that issue to avoid summary judgment. That is, how much beyond the *prima facie* case must the plaintiff go to raise a triable issue that the employer's proferred reasons "were not its true reason, but were a pretext for [retaliation]." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). That which appeared to be a clear cut criterion when developed by this Court, has metamorphized over the years into a higher and higher hurdle to be surmounted by the plaintiff at the dispositve motion stage. The result has been to provide defendants with a ploy to

avoid liability merely by raising a non-discriminatory reason and supporting it with feeble evidence. In this regard, the circuits have been confusing the plaintiff's burden of production with the burden of proof.

For example, the Seventh Circuit has been required to steer an often difficult to discern path between two conclusions. On the one hand, the courts have said that the plaintiff does not, at the pretext stage, face an overly onerous hurdle. *See e.g., Kaniff v. Allstate Insurance Co.*, 121 F.3d 258, 263 (7th Cir. 1997). He is, however, not shielded from summary judgment by a mere unsupported allegation of pretext; or by "an unadorned claim that a jury might not believe [the defendant's] explanation for [the adverse action]." *Giannopoulos v. Bach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997). In any event, to survive a judgment as a matter of law the plaintiff must produce "evidence from which a trier of fact could reasonably infer" that the adverse job action was actually motivated by retaliation. *Troup v. May Department Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994).

Therein lies the problem that the courts were required to meet. How much evidence is required in addition to the *prima facie* case to support an inference of pretext? The very nature of the issue requires an investigation of the employer's intent and state of mind. As a consequence, it is often impossible specifically to contradict the proferred reason. *Russell v. Acme-Evans Company Adm.*, 51 F.3d 64, 68 (7th Cir. 1995) (Evidence to contradict directly the employer's assertions "is rarely within the competence of the plaintiff to give.")

Recently this Court recognized the difficulty of discerning the line between an issue to be determined by the judge and that which must be left to the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In an attempt to give some guidance, this Court focused on

the extent of plaintiff's burden to create a genuine issue of material fact, and observed:

> The court should give credence to the evidence favoring the non-movant as well as the evidence supporting the moving party that is *uncontradicted and unimpeached at least to the extent that it comes from disinterested witnesses."*

Reeves, supra, 530 U.S. at 151 (emphasis added).

Furthermore, this Court admonished the trial courts not to disregard "critical evidence favorable to [the plaintiff]; namely, the evidence supporting [plaintiff's] *prima facie* case and undermining [the defendant's] explanation." *Id*; *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The fact-finder's disbelief of the reasons put forth by the defendant, . . . may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.")

The *Reeves* decision, therefore, effectively eliminates any distinction between evidence a plaintiff uses to reach the *prima facie* plateau of discrimination and the evidence sufficient to meet the burden of establishing an inference of pretext in the dispositive motion. Once the presumption of discrimination "drops out of the picture," petitioners suggest that by producing any evidence of pretext, the plaintiff establishes a triable issue.

In the instant case, both the trial court and the Seventh Circuit panel entirely disregarded this Court's rulings. Instead of examining the issue in the light of plaintiffs' *prima facie* facts and only *uncontradicted and unimpeached* evidence, as required by *Reeves*, the courts elected instead to ignore the evidence that established discrimination *prima facie,* and relied completely on self-serving declarations by high level officials of the DEA and the Department of Justice. Not only is the record below desti-

tute of testimony from "disinterested witnesses"; it abounds with inconsistencies if not outright contradictions in the evidence adduced from those same witnesses. A trier of fact, confronted with those circumstances, could well have disbelieved the proffered reason for the adverse action. That, coupled with the admittedly sufficient *prima facie* evidence was ample to defeat the summary judgment motion.

As a result, the trial court's order and the Seventh Circuit Court of Appeals decision, have deprived these petitioners of the right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

II.

THE QUESTION PRESENTED IS IMPORTANT

Because motions for summary judgment as a matter of law are governed by Rule 56, ignoring the requirements of the Rule and this Court's parameters for application of the standards governing such motions may well jeopardize a party's Seventh Amendment rights. A civil litigant's right to a jury verdict is too important to be stripped away without proper safeguards.

Determining pretext, of necessity, requires an examination of a defendant's intent; which, in turn, rests substantially on a judgment of credibility. It would seem, then, that the issue would preclude summary judgment, particularly in cases where the plaintiff has made out a *prima facie* case of retaliation. In fact, the Second Circuit Court of Appeals has indicated strongly that the issue of pretext *must* be reserved to the trier of fact, and should not be decided by the trial judge in ruling on a dispository motion. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2nd Cir. 1997). "The intent of the employer is a factually disputed matter precluding summary judgment." *Gallagher v.*

Delaney, 139 F.3d 338, 350 (2nd Cir. 1998). That approach is guaranteed to protect a party's Seventh Amendment rights, and yet provide a method for resolving the issue in the fairest possible manner.

In affirming the grant of summary judgment by the trial court, the Seventh Circuit is out of step with the mandate of Rule 56, this Court's prior rulings on the proper standards to be applied, and with the better reasoned opinion of the Second Circuit.

This Court should take this case to resolve the proliferating confusion, and to establish a uniform rule, consistent with Rule 56 and the Seventh Amendment. Litigants should not be subjected to varying and often inconsistent standards concerning the issue of pretext in employment discrimination cases under Title VII.

Certiorari jurisdiction is warranted to correct the error of the Seventh Circuit Court of Appeals and to clarify the law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 00-2766

MICHAEL FLANAGAN, et al.,

Plaintiffs-Appellants,

v.

JOHN ASHCROFT, Attorney General
of the United States, and
DRUG ENFORCEMENT AGENCY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2083—**Elaine E. Bucklo**, *Judge.*

ARGUED MAY 23, 2002—DECIDED JANUARY 21, 2003

Before FLAUM, *Chief Judge*, and BAUER and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* After receiving a complaint that an instructor at its Chicago-based Basic Narcotics Training School used offensive language while conducting a seminar in the fall of 1994, the Drug Enforcement Agency began an investigation that eventually expanded to include five DEA agents who worked as seminar instructors: Michael Flanagan, Norbert Kuksta, Melvin Schabilion, Saul Weinstein, and Francis White. White resigned in the face of a proposal that he be terminated; the other agents were transferred to different cities. All five agents then

filed suit under Title VII charging that the DEA "mishandled" the investigation because they are white, male, and, in Weinstein's case, Jewish, and that the transfers, proposed dismissal, and other employment decisions were acts of retaliation for their opposition to unlawful employment discrimination. The district court dismissed the discrimination count and granted summary judgment for the DEA on the retaliation count, and the agents appeal.

As the basis for their discrimination claim, the agents alleged that the DEA's conduct of its investigation was "egregious" and "unprofessional," that the DEA treated the agents and other witnesses in a "hostile and accusatory manner" and in such a way as to "give credence to false accusations" and to cause the circulation among the Chicago law enforcement community of "untrue rumors concerning [the agents'] professional competence and alleged misconduct," and that the botched investigation resulted in a "sexually charged, racially charged, hostile and offensive working environment." The district court, thinking these allegations similar to those in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), dismissed the discrimination count for failure to state a claim upon which relief may be granted. The plaintiffs in *McDonnell* were HUD employees who were accused by an anonymous complainant of engaging in job-related sexual misconduct. *Id.* at 257. HUD initiated an investigation during which, according to the plaintiffs, investigators interviewed witnesses in a "hostile and unprofessional manner" and indicated "their personal belief that the plaintiffs were guilty of the charges," thereby "g[iving] rise to even more lurid rumors" that "made the plaintiffs pariahs" among their co-workers. *Id.* at 257-58. We affirmed the dismissal of the *McDonnell* complaint, holding that "an investigation of sexual harassment that exceeds the proper limits is [not] itself a form of actionable sexual harassment." *Id.* at 260-61. Permitting discrimination claims based on such inves-

tigations, we explained, would "place[ ] employer[s] on a razor's edge": ignore complaints of sexual harassment and face Title VII liability if the complaints are meritorious, or investigate them thoroughly and face discrimination claims from the targeted employees. *Id.* at 261; *see also, e.g.*, *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000) (relying on similar reasoning to hold that claim for negligent infliction of emotional distress may not be premised on an employer's sexual harassment investigation). We agree with the district court's conclusion that this case is on all fours with *McDonnell*; indeed, the allegations are nearly identical. The agents argue that their case is different because *any* investigation into their conduct would have been unwarranted; the very decision to investigate the complaint, they insist, is evidence of harassment. We see no important distinction, however, between a decision to investigate and the extent of an investigation. Moreover, the agents' suggestion that an employer is not *entitled* to investigate a sexual harassment complaint is untenable, *see, e.g.*, *Malik*, 202 F.3d at 105 ("[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer."); *McDonnell*, 84 F.3d at 260 ("Employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment."), and in any event, as the language we quoted above makes clear, this was not the crux of the agents' complaint.

The district court granted summary judgment to the DEA on the retaliation count because the DEA introduced evidence showing that all employment actions taken against the agents were based solely on the original complaint, the ensuing investigation (in which the DEA found that each of the agents had engaged in miscon-

duct), and on a harassment suit filed against the agents by female seminar attendees and the attendant negative publicity. *See, e.g., Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir.) ("If the defendant presents unrebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment."), *cert. denied*, 123 S. Ct. 79 (2002). In their brief the agents assert that the district court ignored evidence showing that the DEA's explanation was pretextual, but they point specifically only to an unsworn document they call "the invidious list," which details instances in which the DEA purportedly favored minority and female employees. Because the agents' counsel disclaimed any reliance on the list as evidence of pretext at oral argument, we do not address it.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In the United States District Court
Northern District of Illinois
Eastern Division

Flanagan, et al. JUDGMENT IN A CIVIL CASE

v. Case Number: 97 C 2083

Reno, et al.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants' motion for summary judgment is granted and the case terminated. Judgment is, therefore, entered in favor of defendants and against plaintiffs.

Michael W. Dobbins, Clerk of the Court

/s/ Matthew P. John
Matthew P. John, Deputy Clerk

Date: 6/14/2000

In the United States District Court
Northern District of Illinois

Case Number: 97 C 2083 Date: June 2, 1998

Name of Assigned Judge: Elaine E. Bucklo

Case Title: Flanagan, et al. vs. Reno, et al.

* * * * *

DOCKET ENTRY:

* * * * *

- Status hearing set for 6/26/98 at 9:45 A.M.

* * * * *

- [Other docket entry] Defendants' motions to dismiss (25-1, 27-1) and their motion to strike are granted in part and denied in part. Enter Memorandum Opinion and Order.

- [For further detail see order attached to the original minute order.]

* * * * *

In the United States District Court for the Northern District of Illinois Eastern Division

MICHAEL FLANAGAN, NORBERT KUKSTA, MELVIN SHCBILION, SAUL WEINSTEIN, and FRANCIS E. WHITE, Plaintiffs,	)	
v.	)	
	)	No. 97 C 2083
JANET RENO, Attorney General of the United States, and DRUG ENFORCEMENT AGENCY, Defendants.	)	

MEMORANDUM OPINION AND ORDER

On August 20, 1997, the plaintiffs filed a four-count amended complaint against the defendants. In Counts I and II, they allege that Janet Reno, Attorney General of the United States, in her official capacity, discriminated and retaliated against them in violation of Title VII, 42 U.S.C. § 2000e *et seq.* In Count IV, they allege that the Drug Enforcement Administration ("DEA") violated their right to privacy as protected by the Privacy Act, 5 U.S.C. § 552a. The plaintiffs voluntarily dismissed Court III

against the individual defendants.[1] The two remaining defendants, the Attorney General and the DEA, move to dismiss the other three counts and to strike certain remedies. For the reasons set forth below, the defendants' motions are granted in part and denied in part.

Background

The plaintiffs, Michael Flanagan, Norbert Kuksta, Melvin Schabilion, Saul Weinstein and Francis E. White, were at all relevant times special agents of the DEA in the Chicago, Illinois Field Division. All plaintiffs are Caucasian males. Mr. Weinstein is also Jewish.

The plaintiffs allege the following facts. In or about September, 1994, a female student who attended the DEA Basic Narcotics Training School wrote a letter to Kenneth Cloud, Special Agent-In-Charge in Chicago, reporting that she had become offended by some language that was used during the course of Mr. Schabilion's training sessions. As a result of the letter, the Chicago Field Office conducted an investigation of Mr. Schabilion. Upon review of the investigation and its findings, Mr. Cloud gave Mr. Schabilion a Letter of Reprimand for improper conduct and forwarded the letter to DEA Headquarters for approval. The report and proposed disciplinary action were rejected and a full investigation was opened. Subsequently, Mr. Flanagan, Mr. Kuksta, Mr. Weinstein and Mr. White became targets of the investigation as well.

Count I alleges that the plaintiffs were discriminated against and harassed based on their sex, male, and their race, Caucasian. Mr. Weinstein further claims that he

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[1] The individual defendants, Thomas A. Constantine, Stephen Greene, Armando Marin and Steven Casteel, are deleted from the case caption.

was discriminated against because he is Jewish. Plaintiffs allege that they were singled out for a disparate and biased disciplinary investigation and ultimate discipline. Count II alleges that DEA management launched its investigation against the plaintiffs in retaliation for objecting to discrimination and for assisting other DEA employees with their discrimination claims. DEA management is alleged to have transferred plaintiffs for the Chicago Field Office and to have taken away their badges, guns and credentials. Count IV alleges that the DEA violated the plaintiffs' rights under the Privacy Act.

Motion to Dismiss

The defendant initially seek to dismiss Counts I, II, and IV for failure to exhaust administrative remedies. The plaintiffs, however, have alleged that they exhausted their remedies. Consequently, I do not dismiss the counts on this ground.

A. Count I: Discrimination

In *McDonnell v. Cisneros*, 84 F.3d 256, 257 (7th Cir. 1996), the Secretary of Housing and Urban Development ("HUD") received two anonymous letters accusing the plaintiffs, HUD's Regional Inspector General ("IG") for Investigations and Assistant Regional IG, of lurid job-related sexual misconduct. Because the plaintiffs were employed in the IG's office, which would normally investigate such charges, the Secretary retained Defense Department investigators. *Id.* The investigator "interviewed the plaintiffs and other employees of the [IG's] office in a hostile and unprofessional manner, indicating t the persons they interviewed their personal belief that the plaintiffs were guilty of the charges made in the anonymous letters." *Id.* at 258. They further conducted their investigation in

such manner as to "g[ive] rise to even more lurid rumors, widely circulated within HUD." *Id.* Both plaintiffs were eventually exonerated and filed complaints that the treatment they received during the investigation constituted sexual harassment under Title VII. *Id.*

The Seventh Circuit addressed the question of "whether an investigation of sexual harassment that exceeds the proper limits is itself a form of actionable sexual harassment." *Id.* at 260. The court found that no such cause of action existed for two reasons, one practical and one doctrinal. *Id.* at 261. "The practical objection is that it places the employer on a razor's edge." *Id.* The employer would be liable for failing to investigate allegations of sexual harassment and liable for vigorously investigating such charges. *Id.*

The doctrinal objection revolved around Congress's specific provision with respect to the legal remedies of victims of improper investigations by federal officers. *Id.* If the investigators had told the people who they were interviewing that the plaintiffs had engaged in job-related sexual misconduct, which statements were allegedly false and defamatory, the investigators could have been guilty of defamation. *Id.* The investigators would have a defense of qualified immunity but the plaintiffs could substitute the United States as a defendant under the Federal Tort Claims Act ("FTCA"), as amended by the Westfall Act. *Id.* The United States, however, is not liable under the FTCA for defamation by its employees. *Id.* The court concluded that to allow the plaintiffs' Title VII claim would be to inappropriately amend the FTCA and circumvent the Westfall Act by allowing a defamation claim. *Id.*

Under *McDonnell*, the plaintiffs cannot bring a harassment claim based on the DEA's improper conduct during its investigation into alleged misconduct. The plaintiffs

contend, however, that their case can be distinguished from *McDonnell* because they have alleged discrimination on the basis of their gender or religion. The rationale for *McDonnell*, however, extends to discrimination claims. An employer is still placed on a "razor's edge." It if fails to investigate alleged discrimination, it may be liable under Title VII. But if it investigates discrimination, the alleged perpetrator may claim that the employer investigated the allegations against him too vigorously as compared to other similarly situated employees.

In the alternative, the plaintiffs claim that unlike *McDonnell*, where the plaintiffs alleged improper conduct during a warranted and proper investigation into sexual harassment, they allege that the entire DEA investigation was unwarranted and motivated by unlawful bias. *McDonnell*, however, did involve allegations of groundless charges of misconduct. 84 F.3d at 259. The plaintiffs alleged that the anonymous letters were the work of a disgruntled employee. *Id.* at 257. Despite that fact, the Seventh Circuit still found that HUD had to investigate and that there was no claim for harassment based on the investigation.

> Although the complaint was anonymous, the plaintiffs do not argue that their employer was obligated or evenentitled to ignore it. Employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment. It behooved HUD to investigate the charges against the plaintiffs . . .

McDonnell, 84 F.3d at 260. Consequently, the plaintiffs' discrimination claim falls under the *McDonnell* holding and Count I is dismissed.

B. Count II: Retaliation

The plaintiffs bring two retaliation claims. First, they contend that the investigation was in retaliation for objecting to discrimination and for assisting other employees with their discrimination claims. The defendants argue that this claim should be dismissed under the *McDonnell* rationale. *McDonnell*, however, recognized that retaliation is independent of discrimination and harassment. *Id.* at 258 ("The two types of claims, harassment (or other employment discrimination) and retaliation for complaining about or opposing the harassment, are independent."). Even though the plaintiffs cannot bring a claim of harassment or discrimination based on the DEA's conduct during the investigation, they can bring a claim of retaliation.

Second, the plaintiffs allege that the defendants retaliated against them for filing formal charges of discrimination. The defendants claim that the alleged retaliatory conduct is the same conduct which is the basis of the plaintiffs' discrimination claim. *McDonnell* dismissed a retaliation claim where [t]he allegedly retaliatory conduct was merely the continuation of the conduct giving rise to the [harassment] complaints. . . . In other words, nothing changed when [the plaintiff] filed her [harassment] complaints. There was no ratcheting up of the harassment. Therefore the complaints could not have been the cause of the ostracism, disdain, and ridicule of which she complains in the retaliation count.

McDonnell, 84 F.3d at 259.

An analysis of Count II, however, indicates that the plaintiffs alleged conduct other than improper investigation. For example, Mr. Flanagan, Mr. Kuksta, Mr. Schabilion, and Mr. Weinstein all alleged that they were transferred from the Chicago Field Office in retaliation for filing their complaint. Mr. White alleged that DEA manage-

ment took away his badge, gun, and credentials. These allegations demonstrate that DEA management "ratcheted up" the discrimination and harassment such that it constituted retaliation. Thus, I do not dismiss Count II.

C. Count IV: Privacy Act

The defendants argue that this claim is merely a restatement of the Title VII claim and thus should be dismissed under *McDonnell*. In the alternative, the defendants contend that Count IV is preempted by Title VII because it provides the exclusive remedy for claims of discrimination in employment. It relies on the Supreme Court's decision in *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976). In that case, the Supreme Court stated that Title VII provided the exclusive remedy for federal employment discrimination and thus the plaintiff could not seek other judicial remedies for his time-barred Title VII racial discrimination claim. *Id.* at 829.

The plaintiffs allege that the DEA's conduct in investigation the charges was discriminatory and that the DEA disclosed private information in violation of the Privacy Act. These are two separate claims—a privacy violation is not necessarily discriminatory. Furthermore, *Brown* does not preclude a privacy claim. *Brown* merely held that federal employment discrimination claims had to be brought under Title VII. *Id.* It did not hold that conduct underlying a Title VII claim could not also violate other federal statutes. In fact, Privacy Act claims and Title VII claims have been brought together. *See Germane v. Heckler*, 804 F.2d 366 (7th Cir. 1986).

This does not end the inquiry. The plaintiffs' privacy action is still limited. They cannot bring claims for violations of 5 U.S.C. § 552a(e)(1), (2), and (5) because the DEA is exempt from the requirements of those sections.

See 28 C.F.R. §§ 16.98, 16.102. Furthermore, where the DEA is not exempt,[2] some, if not all, of the violations may be barred by the statute of limitations. The plaintiffs filed their initial complaint on March 26, 1997. In their amended complaint, they allege that in or about January, 1995 and continuing thereafter, the DEA violated plaintiffs' rights under the Privacy Act. The Act, however, has a two-year statute of limitations. 5 U.S.C. § 552a(g)(5). Consequently, I will only consider any violations that occurred on or after March 27, 1995.[3]

Motion to Strike Remedies

The defendants move to strike two remedies sought by the plaintiffs. First, the plaintiffs seek to have the Department of Justice ("DOJ") defend them or subsidize their defense in *Markham v. White,* 95 C 2065 (N.D. Ill. filed

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[2] The plaintiffs also allege violations of 5 U.S.C. §§ 552a(b) and 552(e)(6).

[3] The defendants argue that to the extent that the privacy claims are not barred, the plaintiffs are not entitled to a jury trial on those claims. The plaintiffs did not respond to this argument. However,

> [i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government . . . [I]f Congress waives the Government's immunity from suit, . . . the plaintiff has a right to a trial by jury only where the right is one of "the terms of [the Government's] consent to be sued." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). Congress must "affirmatively and unambiguously" grant that right. *Id.* at 168. Since the Privacy Act is silent with respect to the availability of jury trials, the plaintiffs do not have a right to a jury on those claims.

April 5, 1995). If the plaintiffs are being sued in their official capacities, DOJ is required to defend them. If they are being sued in their individual capacities, the decision by DOJ not to defend them is discretionary and unreviewable. *Falkowski v. EEOC*, 764 F.2d 907, 910-11 (D.C. Cir. 1985).

Second, the plaintiffs seek to enjoin the DEA and other federal agencies from making public statements referring to information contained in any records maintained by the DEA or any other federal agency. The plaintiffs cannot enjoin an agency that is not a party to this suit. They also cannot obtain the requested relief for violation of the Privacy Act. 5 U.S.C. § 552a(g)(4) only provides for actual damages and costs, including attorney's fees, for the violations alleged in this case. This does not mean, however, that the plaintiffs are not entitled to this relief under Title VII. *See* 42 U.S.C. § 2000e-5(g)(1) (allowing "any other equitable relief as the court deems appropriate").

Conclusion

For the reasons stated above, the defendants' motion to dismiss and motion to strike are granted in part and denied in part.

ENTER ORDER:

/s/ Elaine L. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: June 2, 1998

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In the United States District Court
Northern District of Illinois

Case Number: 97 C 2083 Date: June 14, 2000

Name of Assigned Judge: Elaine B. Bucklo

Case Title: Flanagan, et al. vs Reno, et al.

* * * * *

DOCKET ENTRY:

* * * * *

■ [Other docket entry] Defendants' motion for summary judgment is granted. Ruling set for 6/23/00 is vacated. Any pending motion in this case is terminated as moot. Enter Memorandum Opinion and Order.

■ [For further detail see order attached to the original minute order.]

* * * * *

In the United States District Court for the Northern District of Illinois Eastern Division

MICHAEL FLANAGAN, NORBERT KUKSTA, MELVIN SHCBILION, SAUL WEINSTEIN, and FRANCIS E. WHITE, Plaintiffs,	)	
v.	)	No. 97 C 2083
JANET RENO, Attorney General of the United States, and DRUG ENFORCEMENT AGENCY, Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs here claim that they were subject to retaliation for complaining that they were white male victims of political correctness. They are present and former federal drug agents (the "DEA agents"), originally based in the Chicago, Illinois, office of the Drug Enforcement Agency ("DEA"), who gave DEA-sponsored training seminars in drug enforcement in the early 1990s. Three women police officer participants in these seminars filed a highly publicized lawsuit, alleging that the DEA agents engaged in sexual harassment during these sessions, that put the agency in an unflattering light. The DEA agents were put on leave, transferred, and subjected to various other actions to which they objected. They filed administra-

tive compliants, alleging that the DEA's investigation of the charges was discriminatory against them as white men, that women or minorities who had behaved as they did would not have been treated as they were treated. In the present lawsuit, they allege that the job actions to which they were subjected were really retaliation for filing these complaints. The defendants move for summary judgment, and I grant the motion.

I.

The plaintiffs are or were "well-regarded and highly decorated federal drug agents." In the early 1990s, they participated in an "incredibly successful" DEA training program for military and local enforcement agents to help those officers understand the dangers involved in drug enforcement and teach them how to gather evidence in drug cases. The DEA agents gave or supervised a number of such training seminars from 1989 to 1995. On April 5, 1995, three women police officers from Madison, Wisconsin, who had participated in their seminars, filed a lawsuit, in which they alleged, among other things, that from 1991 to 1995 the DEA agents:

> (1) gave presentations that were "riddled with talk . . . that glorified aggressive sexual acts by men against women, intermixed with comments glorifying violence and demeaning women in general";
>
> (2) opened each seminar by promising male participants that "[w]hen you men get home you are going to fuck like you've never fucked before. Tell your wife to wear something cheap or nothing at all because you are just going to rip it off. Get the kids out of the house 'cause it's gonna be a brutal fucking assault";

(3) interspersed instructional slides with slides of nude or scantily clad nude females, referred to women in attendance as "hen," "babe," "little girl"; to other women as "bitches"; to black women as "brown sugar"; to Attorney General Janet Reno as "a fuckin' dyke" and a "bitch"; and fantasized out loud about Attorney General Reno and First Lady Hillary Rodham Clinton "getting together and doing other";

(4) described the objective of drug surveillance as "get [ting] laid," "get [ting] her drunk and find[ing] a hotel";

(5) boasted about how DEA agents get "horny" unless they can kill people on a regular basis; about having shot one person 16 times; discussed how the human head looks when hit with a rifle round; talked about how blowing up explosives "will give you a chubby" [an erection], and about making sure that a suspect weighed "ten pounds more" after being shot;

(6) grabbed their own genitals for emphasis, referring to them as "chubby," "woody," "johnson," "pecker," "dick," "rocks";

(7) directed sexual comments to specific women participants, one of them saying, e.g., to a women lying down on a firing range, "I'm getting a hard on!", then grabbing his genitals; inviting a women onstage for a chemical demonstration because "it was more interesting watching a pretty girl"; made reference to her "jiggling" while having her turn sideways so that her breasts could more clearly seen; telling a participant to "put your hot little hands on the bag [used in the demonstration]. Give it a good squeeze, you'll get it going."

Complaint in *Markham v. White*, No. 95 C. 2065, at 3-6 (filed in N.D. Ill. Apr. 5, 1995). The DEA agents admit that they may have been "politically 'incorrect [ ].'" They say, however, that "drug enforcement habitually overshadows any notion of being politically 'correct'. . . . Salty language and four letter words often compromise the essential *sine qua non,* necessary to controlling the dangerous situations encountered while enforcing drug laws." They claim that there is a tension between "political 'correctness' and the desire to assist in the saving of the lives of those thousands of dedicated men and women who hope to stem the flow of dangerous drugs. . . ." the DEA agents do not, however, contend that giving training seminars to law enforcement officers is one of the dangerous situations that might justify or excuse "salty language."

Complaints were made about the seminars in 1994 even before the filing of the *Markham* lawsuit, leading to an internal investigation. Weinstein made an informal charge about the fact of the investigation because he was a white male, no later than mid-March 1995, although the exact date is unclear. There is no evidence that the other DEA agents took protected action before April 1995.

The *Markham* lawsuit created public embarrassment for the DEA. Madison, Wisconsin, TV news reported the allegations on the evening news on April 4, 1995. The AP wire service brought the allegations to the attention of the national media on April 5. On April 6, stories appeared in the *BNA Daily Labor Report*, the *Chicago Sun-Times*, the *Madison state Journal* and *Capital Times*, and as far away as Lakeland, Florida. The women officers' charges were recounted in lurid detail in most of the stories.[1] Virtually all of the most shocking and graphic

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[1] Moreover, *U.S. News and World Report* planned to publish an article discussing the DEA agent's language and conduct in its

(continued...)

language and conduct was quoted and described in *extenso.* On April 7, 1995, the DEA agents were placed on administrative leave with pay by Retha M. Fulmore, DEA Deputy Assistant Administrator of Personnel, at the recommendation of then Deputy Assistant administrator Thomas Byrne. There is debate about whether then DEA Administrator Thomas Constantine was involved in this decision or others connected with the affair. The DEA agents were required to hand over their guns, badges, and credentials while on leave.

On April 10, 1995, DEA Deputy Administrator Stephen Greene decided that four of the DEA agents should be transferred out of Chicago: Melvin Shabilion to Atlanta, Georgia; Saul Weinstein to Newark, New Jersey; Norbert Kuksta to St. Louis, Missouri; and Michael Flanagan to McAllen, Texas. Greene denied that the transfers were disciplinary. He testified that they made for "the good of the individuals involved and the good of the agency"; the DEA agents dispute this. The DEA agents were given 45 days to report to their new duty stations instead of the usual or former 90 days. They filed their first series of official complaints on April 11, 1995, following these up with further complaints on May 8 or 9, and then more complaints in late May and June.

As a result of the DEA's initial investigation into the police officers' charges, the agency proposed to terminate Francis White at Green's recommendation, but no final decision was reached before Agent White retired on May 1, 1995. Agent White claims that he was constructively discharged, as does Agent Weinstein, who resigned from the DEA in October 1995. Agent Flanagan received a letter

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[1] (...continued)
issue of June 5, 1995, and interviewed DEA officials about the allegations.

of reprimand, and he claims he failed to receive certain promotions, including one to the Brownsville, Texas, Resident Office, because of his protected activity. Some of the other DEA agents have other incidental complaints as well. This lawsuit followed.

II.

The standards for summary judgment are well known and need not be recited here. To make out an indirect case for illegal retaliation, the plaintiffs must show that (1) they engaged in activity protected under Title VII, (2) they suffered adverse employment action; and (3) a casual connection exists between the adverse action and their participation in the protected activity. *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir. 1995). If this *prima facie* case is made out, defendant employers must rebut with a showing that they acted from nondiscriminatory reasons, which the Plaintiffs can defeat by producing evidence that the proffered reasons were pretextual. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 983 (7th Cir. 1999).

Here, the defendants do not dispute that the DEA agents engaged in protected action in filing the complaints. They do argue that the DEA agents did not suffer adverse employment action. An adverse actions occurs when an employee is fired or demoted, suffers a decrease in benefits or pay, or is given a significantly lesser job. *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996). Not every unwelcome employment action qualifies as an adverse action: negative reviews, a change in job title, an increased distance to travel to work, or a lateral transfer do not, by themselves, qualify. *Id.* The DEA agents do not adequately respond to the defendants' arguments that being placed on administrative leave with pay is not adverse

enough. They merely assert that this is adverse action. The argument is therefore waived.[2] *Koelsch*, 46 F.3d at 708.

Whether or not being placed on administrative leave is adverse action, the DEA agents also argue that transfers to far flung places constitute adverse action. I understand the Seventh Circuit's admonition that mere "lateral transfers" are not adverse action to apply within a reasonably compact geographical location. The case on which the *Koelsch* court relies for that proposition, *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989), concerned travel within a single school district, see *Id.* at 885. Being uprooted from one's community in Chicago and dispatched on 45 days notice many hundreds of miles away to Newark, McAllen, Atlanta, or St. Louis, whatever the charms or advantages of those communities, is not a "lateral transfer." In the circumstances, it is adverse employment action.

The defendants argue that it would have been adverse action actually to have terminated Agent White, but that he was not disciplined at all because he resigned. Fair enough, but their answer to his claim that he was constructively terminated is that he must show that the defendants made his workplace intolerable. *Drake v. Minnesota Mining & Manufacturing*, 134 F.3d 878, 886 (7th Cir. 1998), and that a complaining employee is ordinarily expected to stay and fight. *Id.* However, since the employee's termination was actually proposed, Agent White's is not the ordinary case, and a reasonable jury might believe that his workplace had become so intolerable that a reasonable person would have to quit.

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[2] A long term administrative leave, which would deprive an employee of work, any chance to advance, and other benefits, probably could constitute adverse employment action. It is less clear at what point this would become an adverse action.

According to the defendants, Agent Flanagan's reprimand was not adverse action because counseling letters or negative evaluations have been held not to be such action. But the reprimand was not a counseling letter or a mere negative evaluation. The DEA admits that it was disciplinary in nature, and if that is not adverse, what is? Agent Flanagan fails to make out a plausible case, however, that he was denied any promotions or transfers that he applied for, or indeed to offer any evidence, even his own sworn testimony, that he actually applied for any promotions or transfers after he was posted to McAllen. The DEA agents' other allegations of adverse job action are frivolous.

The DEA agents' causation argument is based on the principle that a "telling temporal sequence" is enough for a causal connection. *Davidson v. Midelforth Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998). First, they contend that on March 27, 1995, then DEA Administrator Constantine was "personally informed that the five Plaintiffs had file informal . . . complaints," and they were placed on administrative leave less than three weeks later. But the evidence they cite, DEA Agent James Morgan's affidavit, supports only the claim that Constantine had not been advised of Agent Weinstein's informal discrimination charges. It specifically states that Constantine had not been advised of Agent White's informal charges, and it says nothing about the others. Moreover, the DEA agents bring forward no evidence contradicting the defendants' sworn testimony that Constantine had nothing to do with the challenged decisions. Finally, as explained, the DEA agents do not show that administrative leave as such is adverse action, so there would be nothing in the temporal sequence to connect to Constantine's knowledge of Agent Weinstein's complaint.

Second, the DEA agents who transferred testify that they were transferred "within hours" of notifying an agency

EEO Counselor on April 10, 1995, that they intended to file formal charges. There is dispute about whether Constantine was involved in this decision, and the DEA agents' claim that he was involved rests on hearsay, but his involvement is not necessary for the causation argument. Because the transfers are adverse action in this context, the temporal sequence is established, and the causation element is satisfied for the transferred DEA agents.

The real issue in the case is whether the defendants' proffered reason for the transfers and other adverse action was legitimate or pretextual. It would not be retaliatory or otherwise illegal to transfer, reprimand, and even fire employees who had embarrassed the agency in the manner described. Indeed, if the agency had determined that the Madison policewomen's charges were true, the DEA arguably should have been disciplined regardless of whether the agency was publicly embarrassed. So the DEA agents must bring forward enough evidence to persuade a rational jury that the proffered reason is pretextual. Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action. *Wolf v. Buss (America), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996). A plaintiff can prove the incredibility of the employer's proffered reasons, and thereby demonstrate pretext, by showing that the employer's proffered reasons are (1) factually baseless, (2) not the actual motivation for the discharge, or (3) insufficient to motivate the adverse action. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1130 (7th Cir. 1997).

The DEA agents make no effort to show that the reason was factually baseless—they admit that they behaved "politically incorrectly," leading to a lawsuit and public embarrassment for the agency. They do not deny that this would be sufficient to motivate transfers, reprimands,

or even termination. They rest their case on the argument that the proffered reason was not the actual reason. Although the DEA agents sat that "suggestions to the contrary border somewhere between the absurd and (the) inane," they do not begin to show this.

The DEA agents assert, with no evidentiary support, that they were treated differently, but they do not even say from whom or how. They say that the timing of the transfers is "suspicious," but they were transferred the day after the DEA was depicted as a serial sexual harasser in the national media due their behavior.

The DEA agents say that the image problems had been "forestalled" by placing them on administrative leave; but even if so, that is not a reason to doubt that they were transferred because of the embarrassment they had caused. They claim that it is "suspicious" that the posts were far apart and located inconveniently far from Chicago, where the *Markham* lawsuit is pending, but it is not surprising that posts available on short notice would be widely dispersed. They argue that it is "fishy" that the government refused to defend the civil case against them, but that is irrelevant to the motivation for the adverse job actions. Finally, the DEA agents allege that various problems arose with the transfers, *e.g.*, that there was no post in Newark for Agent Weinstein and that McAllen was bad for Agent Flanagan's children, but problems arise with any transfer. This does not bear on whether the DEA transferred them because of their embarrassing behavior.

An employer has the right to discipline employees that disgrace it with shameful and, if the women officers' allegations can be proved, quite possibly illegal conduct. Exercise of that right is not retaliation. The DEA agents fail to satisfy their burden that the defendants acted for other than the entirely legitimate reasons stated. The

defendants' motion for summary judgment is therefore Granted, terminating this case.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: June 13, 2000

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